

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1907

No. 1819.

511

HUGH HARTEN, APPELLANT,

vs.

ANDREW D. LOFFLER AND THOMAS E. JARREL,
TRADING AS LOFFLER & JARREL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 10, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 1819.

HUGH HARTEN, Appellant,
vs.
ANDREW D. LOFFLER ET AL.

a Supreme Court of the District of Columbia.

No. 47992. At Law.

ANDREW D. LOFFLER and THOMAS E. JARREL, Trading as Loffler
& Jarrel, Plaintiffs,
vs.
HUGH HARTEN, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Memoranda.*

October 4, 1905.—Petition for Writ of Certiorari filed and Writ ordered to issue.

October 5, 1905.—Return of R. H. Terrell, J. P. to Writ of Certiorari, filed.

Declaration.

Filed October 14, 1905.

In the Supreme Court of the District of Columbia.

No. 47992. At Law.

ANDREW D. LOFFLER, THOMAS E. JARREL, Trading as Loffler &
Jarrel,
vs.
HUGH HARTEN.

The plaintiffs, co-partners, sue the defendant for money payable by the defendant to the plaintiffs, for that the said defendant on,
1—1819A

to wit, the first day of April, A. D. 1905, and for some time prior thereto, was the owner and was possessed of a certain tract or parcel of land situate in the District of Columbia, improved by certain houses and buildings, in which he carried on the saloon, inn and tavern and retail liquor business, and being desirous to sell
 2 and dispose of the same, did employ and retain the plaintiffs, who were real estate agents and brokers, being thereto duly licensed, to find and obtain a purchaser therefor and negotiate a sale thereof. And the plaintiffs aver and say that on the 27th day of April, A. D. 1905, they found a purchaser for the said property and negotiated a sale thereof, and the defendant agreed to sell the said property to the purchaser so obtained by them for the sum of Twelve Thousand dollars (\$12,000.00), but subsequently refused to carry out or comply with his said agreement. And the plaintiffs aver, that in consideration of the services rendered by the said plaintiffs to the said defendant, in finding and obtaining such purchaser and negotiating said sale, as aforesaid, the defendant did promise and agree, to and with the plaintiffs, to pay plaintiffs the sum of Three Hundred dollars (\$300.00); and the plaintiffs further aver and say, that the said defendant, although thereto often requested, has failed, neglected and refused, and still does fail, neglect and refuse to pay to them the said sum of Three Hundred dollars (\$300.00).

And the plaintiffs claim the sum of Three Hundred dollars (\$300.00), with interest thereon from the 27th day of April, A. D. 1905, besides the costs of this suit.

And the plaintiffs sue the defendant for money payable by the defendant to the plaintiffs; for work done and services rendered by the plaintiffs for the defendant, at the defendant's request, and for money payable by the defendant to the plaintiffs on accounts stated
 between them.

3 And the plaintiffs claim the sum of Three Hundred dollars (\$300.00), besides the costs of this suit.

LEON TOBRINER,
Attorney for Plaintiffs.

Pleas of Defendant.

Filed November 10, 1905.

In the Supreme Court of the District of Columbia.

No. 47992. At Law.

ANDREW D. LOFFLER, THOMAS E. JARREL, Trading as Loffler &
 Jarrel,

v.

HUGH HARTEN.

1. For a plea to the first count of the declaration of the plaintiffs the defendant says he did not promise and agree to and with the plaintiffs in manner and form as the plaintiffs have therein alleged.

2. For a plea to the second count of said declaration the defendant says he is not indebted to the plaintiffs in the said sum of \$300. or any part thereof.

LORENZO A. BAILEY,
Attorney for Defendant.

4

Joinder of Issue.

Filed November 14, 1905.

In the Supreme Court of the District of Columbia.

No. 47992. At Law.

ANDREW D. LOFFLER ET AL.

vs.

HUGH HARTEN.

The plaintiffs join issue upon the first and second pleas of the defendant filed herein.

LEON TOBRINER,
Attorney for Plaintiffs.

Memoranda.

May 9, 1906.—Verdict for plaintiff for \$300.

May 29, 1906.—Time in which to submit exceptions and to file record in Court of Appeals, extended to October 1, 1906.

5

Supreme Court of the District of Columbia.

MONDAY, *June 11th*, 1906.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

No. 47992. At Law.

ANDREW D. LOFFLER, THOMAS E. JARREL, Trading as Loffler & Jarrell, Plaintiffs,

vs.

HUGH HARTEN, Defendant.

Upon consideration of the motion for a new trial filed herein it is ordered that said motion be and is hereby overruled, and judgment on verdict is ordered. Thereupon, it is considered and adjudged that the plaintiffs herein recover of the defendant herein the sum of Three Hundred Dollars (\$300.00) with interest thereon from this date, together with costs of suit, to be taxed by the Clerk, and have execution thereof. From the foregoing judgment the defendant

by his attorney in open Court notes an appeal to the Court of Appeals, whereupon, bond to operate as a supersedeas is hereby fixed in the sum of Six Hundred Dollars (\$600.00) with surety or sureties to be approved by this Court.

Memoranda.

June 12, 1906.—Appeal bond filed.

October 1, 1906.—Bill of Exceptions submitted to Court and time to file record extended to January 7, 1907.

Supreme Court of the District of Columbia.

MONDAY, *January 7th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

No. 47992. At Law.

ANDREW D. LOFFLER ET AL.

v.

HUGH HARTEN.

Pursuant to stipulation of the parties herein filed, it is, by the Court ordered, that the settlement of the bill of exceptions be and is hereby postponed until after the decision and final determination by the Court of Appeals of the District of Columbia in the suit now pending in that Court, wherein, Hugh Harten is appellant and Ernest Loffler is appellee, No. 1727, and be then settled as of the date of the trial herein; being the same bill of exceptions which was presented to the Court for settlement on October 1, 1906;

7 and further ordered, that the time for docketing in said Court of Appeals the appeal of said Harten from the judgment herein rendered be and is hereby extended until one month after said decision by the Court of Appeals shall have been duly entered in said Court. And further ordered, that this order is made to be entered as of October 1st, 1906.

Memoranda.

June 7, 1907.—Time to file record extended to July 15, 1907.

July 11, 1907.—Time to file record further extended to August 15, 1907.

Supreme Court of the District of Columbia.

WEDNESDAY, *July 24th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

No. 47992. At Law.

ANDREW D. LOFFLER ET AL., Pl'ffs,
vs.

HUGH HARTEN, Defendant.

The Court having this day signed the Bill of Exceptions heretofore submitted herein, as of the time of the noting thereof at the trial herein, the same is now ordered of record *nunc pro tunc*.

8

Bill of Exceptions.

Filed July 24, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47992.

ANDREW D. LOFFLER ET AL.
v.

HUGH HARTEN.

Be it remembered that upon the trial of the above entitled cause before the Honorable Thomas H. Anderson, one of the associate justices of this court and a jury, begun and had on the 8th day of May, A. D. 1906, and continuing until and ending upon the 9th day of May, A. D. 1906, evidence was adduced on behalf of the plaintiffs tending to prove that on and since and prior to April 27, 1905, the defendant owned, and occupied as his residence and place of business, a certain parcel of land situate in the District of Columbia, on the West side of Brightwood Avenue also known as Seventh Street Road near Battle Ground Cemetery, and bounded by a line commencing at a point at the intersection of the West line of said Avenue with the South line of a lane, being the Northeast corner of a tract of land formerly known as Brainerd's tract, and running thence along said Avenue South, seven and three-fourths ($7\frac{3}{4}$) degrees West, Eighty-five (85) feet; thence North, Eighty-two and one-half ($82\frac{1}{2}$) degrees West, two hundred and twenty-four (224) feet to Brainerd's North line, thence North, Seventy-seven (77) degrees East, along the South line of said lane, two hundred and thirty-nine (239) feet and Six (6) inches to the place of beginning, all being closed by a fence on said boundary line and improved by a house and other buildings; that the said house had a frontage of fifty-one (51) feet and six (6) inches on said Avenue, leaving unoccupied at the front of said tract and serving as an entrance to and from said Avenue a driveway south of the house twenty (20) feet wide and also on the north end a triangular piece fronting thirteen (13) feet and six (6) inches on said Avenue; and that the

9 photographs offered in evidence were exact pictures of the front of the defendant's property; that measuring from the south line of the plot 60 feet north on the front line would bring

the end of the line to a point marked with a red cross in the pictures which, by stipulation, are made part of the record. That, by such measurement the south 40 feet of the building only would be included and the north $11\frac{1}{2}$ feet would be excluded, as also the small triangular strip on the extreme north of the building.

Thereupon ANDREW D. LOFFLER, one of the plaintiffs, produced and sworn as a witness on behalf of the plaintiffs, testified as follows: On April 27, 1905, the plaintiff Jarrell and I, under the firm name of Loffler and Jarrell, were engaged in the real estate business, buying and selling real estate in the District of Columbia. On or about February 22, 1905, I went to the defendant, Hugh Harten, and introduced myself to him and told him who I was and that I was in the real estate business and that I heard his place was for sale and he said it was. Before that time I knew his place but was not personally acquainted with him. I asked him what he wanted for it and he said \$12000. I told him I probably could get him a purchaser. He said, "All right;" that if I could get him a purchaser for \$12000 he would sell it. I knew that Mr. Ernst Loffler wanted to get a place on the road; at least he told me he wanted to get a place on the Road so he could have a home and a bar room business. I told him he could get Harten's place for \$12000. He then told me to offer Harten \$11000. So I offered Harten \$11000. for the business and he said he would not sell it. So we finally came to an agreement that Mr. Loffler would take it for \$12000. That agreement was in writing and I saw them sign it, on April 27, 1905. Between February 22, and April 27, 1905, I saw Mr. Harten in connection with this sale a good many times; I will average it three times a week. I made him an offer for Mr. Loffler for \$11000. The purpose of my visits to him was to get the
 10 property for that price and I kept on going to see him. Finally they came together and signed this agreement. When Mr. Loffler was satisfied to take the place and I told Mr. Harten I could get a buyer and that included a commission of three per cent. he said "That is too much." I said, "Will you be satisfied to give me \$300." He said "Yes, I will pay you for all your trouble." He agreed to give me \$300. My regular commission would have been \$360.; the agreement was signed at Mr. Harten's residence, the place described in the photograph.

Counsel for the plaintiff then put said written agreement in evidence, the same being as follows:

"AP'L 27, '05.

For and in consideration of the sum of twelve thousand dollars, two hundred and fifty dollars whereof is hereby acknowledged I hereby agree to sell to Ernst Loffler the property, good will, license, fixtures, located on Brightwood Ave. near Battle Ground Cemetery fronting on B'wood Ave. about 60 foot with a depth of about 200 feet—title and transfer of license guaranteed or deposit to be refunded—I agree to use my best efforts to secure the signers for the

transfer of said license & to give said Loffler a clear title to all of above property.

HUGH HARTEN.
JULIA HARTEN.

Witnesses:—

S. S. RICHARD.
A. D. LOFFLER, JR.

I hereby agree to accept the above contract and will purchase the property on the above terms & conditions.

ERNST LOFFLER."

(Witness A. D. LOFFLER, continuing:) I am A. D. Loffler, Jr. Harten authorized me to sell all the property he had on Brightwood Avenue where his business was located, the business, the
11 license, the property, just everything he had, except stock in trade on hand. The receipt was prepared and written by Mr. Salvatore Richard in my presence.

Thereupon counsel for the plaintiff asked the witness: "From whom was this description, 60 feet front by 200 feet in depth, obtained;" to which question the defendant by his attorney then and there objected upon the ground that the question and the evidence sought thereby to be adduced was immaterial, irrelevant and inadmissible; but the Court overruled the objection and permitted the witness to answer the question; to which ruling by the court the defendant by his attorney then and there duly excepted and the exception was by the said Justice then duly noted in his minutes.

Thereupon the witness answered the question as follows: "From Mr. Harten."

(Witness continuing:) That was when the agreement was signed. When Richard wrote the agreement he said he better describe that property so there would not be any trouble and I asked Harten how many feet of front he had there——

Mr. BAILEY, counsel for defendant, then interrupted the witness and said: "I object to going into any conversation as to what was covered by the contract; and I object to any evidence going to show what was intended to be conveyed by the contract, upon the ground that the contract must speak for itself, and it cannot be pieced out and made to include more property than the contract calls for upon its face as written and that such testimony is contrary to our Statute of Frauds."

The COURT: "I think he may prove by this or any other witness that was present, the circumstances under which the defendant furnished that description, not for the purpose of changing the contract but for the purpose of identifying the property; in other words, to identify the contract with the specific property they were dealing
12 with there. The description as we have it there does not cover the entire property. The witness has testified he was authorized to sell the whole of it, but the description does not cover the whole of it. Now, they have a right to show to what that description applies, in other words, they have a right to apply

the description to the property sold. In doing that they may show the circumstances under which the description was given, not for the purpose of contradicting the contract or varying its terms in any way, but simply to apply the description to the proper subject matter."

Mr. BAILEY: "I understand, your Honor, that the purpose here is to show that the contract was intended to include the whole property, the entire tract, notwithstanding the limitation stated in it by the words, 'about 60 feet by 200 feet.' I take it under your Honor's ruling as indicated now, that there will be a great deal of testimony going in on that point, and I would like to reserve my exception to the ruling. I understand your Honor admits that testimony, and I would like to have it understood that all testimony on that line goes in subject to my exception."

The COURT: "It will apply."

(Witness continuing:) I told him he better tell us how many feet front he had, the size of the lot or the number of square feet so we could put it into the agreement, so we could identify it. And he said he did not know exactly how many feet there were. And so we went out on the front porch and we made a guess at it. One said sixty feet and one said sixty-five. And so Mr. Harten said, "put down about 60 feet front by about 200 feet deep. That will cover it." That is the way it is written in here. We were talking about the property I sold. The driveway south of the house goes to the backyard. At the front of the house the bar room is at the south side next to the driveway. Next to that is the sitting room. Next to that is the hallway and next to that at the north side of the house is the store room. Next to that is a small triangular un-
13 improved strip. Upstairs on the south side is Mr. Harten's bed room and on the north side a room that is called the ball room. The kitchen was in the rear of the storeroom on the north-side. Back of the kitchen was a poolroom, fronting on the lane. About in the center of the premises was a wind mill. All the buildings ran along the lane; the stable and everything. (The witness inspected the pictures offered in evidence in making the foregoing explanation.) Before the agreement was signed Mr. Harten showed me through the property only once. Mr. Loffler, the purchaser, was in my company at that time. I went over the property several times alone.

Mr. BAILEY: "Of course it is distinctly understood that this goes in under my objection."

The COURT: "Yes, it goes in under your objection."

(Witness continuing:) This was before the agreement was signed. We started in the bar room and then went to the sitting room, then the storeroom, then the kitchen and then out the back. He showed us the wind mill; then he took us into the house upstairs as far as the ball room which is over the store room in the new portion; then we came down and he left us and went into the bar room and Mr. Loffler and myself went in the yard. This was several weeks before the agreement was signed. We happened to go over the property because Mr. Harten wanted to show Mr. Loffler

what he was buying. After the agreement was signed I started to get the signors for the transfer of the bar room license from Harten to Loffler. I was one signer short. I was pretty successful; I got them all except Mr. Harten. I got the majority of the owners and residents within 250 feet and then it was the majority across the street. About a week or two weeks after the agreement was signed I went to get Mr. Harten's signature. I told Mr. Harten I needed his signature, also, to get the license. And everything could be straightened out, and he would not give me any answer
14 at all, and I kept on going after him; it looked like he did not want to sign it, and there was something wrong. I told him we had to have it. He finally told me he would not sign it. He did not give me any answer why he would not sign it. I reported this to Loffler who tried to get Mr. P. B. Ray a member of the bar to go out with me. Mr. Loffler and I went out and told Mr. Harten we were ready to close the deal and asked him to sign the license but he refused and said he would not sign any papers. He told me his wife objected to selling the place. She had signed the contract. Then we had a deed prepared for the property. Mr. Loffler, Mr. Ray and I went out and asked Mr. Harten to sign the deed for the property. I said we would run the chance of getting the signers. Mr. Loffler had the money with him. Mr. Harten said he would not sign the paper. Right after that Harten offered me \$100. to drop the case; to let the whole thing fall through. I told him I could not do anything like that, and so I dropped it. I never bothered with it. Mr. Harten never conveyed the property to Loffler. After that Harten refused to pay me my commission.

Thereupon it was admitted by counsel for the respective parties that the deed which the defendant was requested to sign as stated in the testimony of the plaintiff Loffler included all the real estate owned by the defendant as hereinbefore described, being the entire tract containing 85 feet on Brightwood Avenue with a depth of 224 ft. on the south side and 239½ ft. on the north side.

Upon cross-examination the witness ANDREW D. LOFFLER further testified as follows: The reason I went out and introduced myself to Harten was that I heard his property was for sale and I knew Ernst Loffler wanted to buy a place out on the road. Mr. Loffler was one of those who told me the place was for sale. He came to me and said "You are in the real estate business; if you can get that
15 place I will buy it through you." That was about two months before I went up to see Harten. Ernst Loffler spoke to me again and it was before I went up to see Harten. He said I should find out if Harten's place was for sale and what he wanted for it. I said I would do it. He said he would buy it. I had no talk with Ernst Loffler about my commission; I could not charge a man that bought the property a commission; I never did. Question: "You never did?" Answer: "The man that sells the property generally pays the commission." To which answer the attorney for the defendant objected on the ground that the same was not responsive and was wholly irrelevant and on the same grounds moved that the said answer be stricken out, which objection and

motion were overruled by the court, to which ruling the defendant by his attorney then and there duly excepted and the exception was then duly noted by said Justice in his minutes. (Witness, continuing:) When I introduced myself I introduced myself as a member of the firm of Loffler & Jarrell. In broaching the subject to Harten I told him I heard he wanted to sell his place. His place, his property, his saloon; what he had there. I heard he wanted to sell the property. I will not say positively I did not use the word "saloon." I do not mean to say that I told him I heard he wanted to sell everything he had. About a week or so after my first visit I was again out to Harten's place and met Mrs. Harten and told her I wanted the place for a friend of mine. That was probably my second visit there. When Mr. Harten asked me on my first visit for whom I wanted the place I said "never mind I will tell you later on." The reason I said that to him is if a man has a customer for a piece of real estate, I do not think he would tell the man who the customer is; he would not need an agent then; he would sell it without the agent. It was about two or three weeks after my first visit to Harten's that I informed him that Ernst Loffler was the purchaser. I then said to Harten "Now that you are satisfied to pay me my commission, I will take the man out and show him the property." That was the day before I took

16 Loffler out. When Richard was writing the agreement and before it was signed I said to Harten he ought to put in there "subject to 3% commission." He said, "never mind; that is all right." He said he would not pay 3% the full commission. I don't think he said he had nothing to do with the commission but I will not say positively that he did not say so. I told him \$300 would be satisfactory to us and he said, "all right; I will pay you for your trouble." He said "my word is my bond." That is the very words he used. That was while Richard was writing the agreement. It is a fact that I went out there for the sole purpose of getting this business and this place for Ernst Loffler. He was the customer I had for the place; when I first went out to see Harten about the place, he told me that he wanted twelve thousand dollars for the place, and that if I got a customer for him to let him know. From February 22 to April 27, I went out to see Harten two or three times a week. Loffler told me to offer eleven thousand dollars for it. I told Harten I had an offer of eleven thousand dollars for it and he said twelve thousand was the lowest he would take for it. I did not tell him who made that offer. The necessity for so many visits to Harten was because I was trying to get it for \$11000. Mr. Loffler told me he would not want to pay more than that amount and I was trying to get it for that. I told Harten I had an offer of eleven thousand dollars for it. He always refused that. I was interested both ways; I was trying to get it as cheap as I could for Mr. Loffler and I was trying to get all I could for Mr. Harten. When Richard was writing the agreement we, all of us, referred to the bar room license in order to describe the place. We were in the sitting room adjoining the bar room. Mr. Harten got the license and brought it into the sitting room and in it the place was described as opposite

Battle Ground Cemetery. In my previous statement that we all went out on the porch to guess at the width of the place I don't mean that Mr. Harten went out. I don't think he did. Ernst

17 Loffler and I went out on the porch, and we sized the place up. We were all there in the room and Mr. Harten told us to make a guess at it; size it up and so we did. We could see the whole front from the porch. We did not go off the porch at all. Mr. James B. Orme was one of the signers we had to have for the transfer of the bar room license. I understood him to be a necessary signer when Harten refused to sign. I told Harten I could not get Mr. Orme; that Mr. Orme refused to sign. The time when Harten wanted to pay me \$100 to get out of it was the same day that Ernst Loffler and Mr. Ray had asked him to sign the deed and after they had gone. After Mr. Loffler and Mr. Ray had gone Mr. Harten called me into the little sitting room and said, "Loffler, how can I get out of this," I said, "The only way to get out of it is to turn the property over to Mr. Loffler. You are getting a fair price for it." He said, "No, my wife refuses. Cannot you do it and I will give you \$100.," and he threw a check book down on the table and he says, "You can get me out of it." I told him I could not do it; it would not be right; it would not be business. I spoke up for Mr. Loffler. I said he had his deposit up and he had bought the place and his place was sold in Georgetown and that put him out of the whole thing and the man ought to have the place. That was all that was said on that occasion. The last day we were out there with the deed Harten wanted to see the contract and I believe Mr. Ray showed it to him. I cannot say whether it was a copy or the original Mr. Ray showed him. I asked Mr. Harten to pay me my commission right after the deal fell through. I asked him for \$300, the amount he agreed to pay. He first agreed to pay me the three hundred dollars when I told him I had a customer and who the customer was. I told him I had a customer for the place, and if he would pay me the commission I would bring him out tomorrow, and he said everything was all right. These are about the words. He kicked on three per cent. and we agreed on \$300. When he was asked to sign for the transfer of the license no money

18 was offered to him. I think they offered him the money when they went out there to get him to sign the deed.

Upon redirect examination the witness, ANDREW D. LOFFLER, further testified as follows: I asked Mr. Harten to sign the license because his signature was necessary for its transfer. The time Harten offered me the \$100 his arm was in a sling. I believe he broke his wrist or had something wrong with it. I don't know which arm. He threw the check book down and told me to write the check out. The time that I went out with Loffler and went over the property Mr. Harten showed us through the house and took us back in the yard and pointed out the different buildings he had; he showed us everything he had in the yard; he showed us whatever he had in the place.

And thereupon ERNST LOFFLER, a witness produced and sworn on behalf of the plaintiffs, testified subject to the foregoing objections taken and exceptions reserved by the defendant as follows: A few days before entering into the agreement of April 27, 1905, with the defendant, Harten, I went out to his place with Andrew Loffler. Harten showed us through the whole house. Mr. Loffler told Harten that I came out there to look at the place; that I was the party who wanted to buy the place. Mr. Harten showed me through the place; I went into the bar and dining room, through the hallway and then into the storeroom, the storeroom on the north side; then he took us from the storeroom to a kind of a ballroom and from there we went to the front part of the house where they slept; he took us through the whole house; also through the kitchen and dining room; the kitchen is back of the storeroom; back of that is the pool room; he took us over the building and showed us all these things; after he had shown us the inside of the building and the various rooms, he took us out into the yard where the wind mill is;

showed us around the building one thing and another; then
19 Harten went back into the bar; and we walked around; we just wanted to see the place; we went out a few days afterward and made the agreement. The day the agreement was signed Mr. Richard went with me from my place to Harten's. I telephoned to Mr. Harten that we would like to come out there and close the deal with him; he said all right, come out. I don't know who it was at the telephone but I think it was Harten; he was waiting for us when we got there; we walked into the little back room, Mr. Harten came in and Mr. Richard was the first one who spoke; he said we came out to close this deal; he said all right I am satisfied. I phoned over to Andrew Loffler to come out to close the deal and he was there when we arrived. Mr. Richard wrote the agreement at my request. When he got down to the description of the real estate we were guessing at it. Andrew Loffler walked outside and said, "How much front is in this place." Mr. Harten was standing up towards the bar room door and he said, "Well, put down about sixty feet. That is close enough." And when we came to the depth of it he says, "Put down about two hundred feet," and that was put down as he said. He was talking about his place; his own property. It was understood the whole of the property. He said nothing about reserving any of that property then or at any previous time when I was talking with him about purchasing the property. All that was mentioned was the property; what was there; the whole of the property in the Harten estate; I paid the deposit of \$250. After the agreement was signed I took my wife out to look over the property; he took me and my wife all over the place; this was only a few days after the agreement was signed; we went up the same stairway, about the same way we went the first time; he took us into the store room, into the kitchen and everything. After that Mr. Loffler, Mr. Ray and myself went out to Mr. Harten to get him to sign the application for the transfer of the license and Mr. Harten refused to do it; he said he would not sign any paper;
20 he gave no reason for it. And thereupon it was admitted by counsel for the defendant that Mr. Loffler had tendered

and offered to pay to Mr. Harten the twelve thousand dollars mentioned in the agreement if Mr. Harten would sign the deed offered in evidence; and that Harten owned all the property 85 feet front by 224 feet depth, containing about 9,520 square feet, and that the deed offered to the defendant for execution described what he actually owned.

Upon cross-examination the witness Ernst Loffler testified as follows: I never had any particular talk with Andrew Loffler about buying that property; he mentioned it to me; he came to me first, Mr. Loffler did; he spoke to me; I had spoken to him sometime before about getting a little place in the country; that is how it first started, and he said I will watch out. And he came to me and said he thought he could get this place, and I said look it up; he told me he had found a place but did not tell me it was Harten's place at first; that was probably a month before the contract was signed; he spoke to me about Harten's place before I ever spoke to him about it. The first I ever heard about Harten wanting to sell was from Charlie Hood or from Mr. Burkart. I then had a conversation with Mr. Salavadore Richard about it and after that I went to Andy Loffler, one of the plaintiffs, and sent him to negotiate with Harten, about a month before the agreement was signed. I never had any conversation with Andy Loffler about Harten's place before that time. Mr. Loffler told me about the property first. In my suit in this court against Harten, for breach of that agreement, I think I testified that after Richard told me Harten's property was for sale, I went to Andrew Loffler and sent him to negotiate with Harten and also testified that I told Loffler not to tell Harten that I wanted the business.

21 On re-direct examination the witness testified that during the negotiations with Harten for the sale, the stock in the establishment was spoken of; Harten said he would not sell the stock; that the stock would not go with the other part.

Whereupon ANNA LOFFLER, a witness on behalf of the plaintiff testified as follows: She is the wife of Ernst Loffler the previous witness; she visited the Harten place one or two days after the agreement for sale was signed; went with her husband; met Mr. and Mrs. Harten; Mr. Harten took us around; he took us into the sitting room from the barroom, then upstairs; all through the ball room all his bed rooms, down into the kitchen, into the dining room and store room and into a little room which is the sitting room; showed us all over the yard and into the pool room; the storeroom is down stairs and the ball room is over the store room; we went up one flight of stairs and down another; he also took us into the cellar, which is under the bar.

And thereupon, HUGH HARTEN, the defendant, on his own behalf testified as follows: (Witness examines the photographs in evidence:) This photograph is a correct representation of it. This is a good picture. It shows doors leading, respectively, into the barroom, the hallway and storeroom. You can get upstairs in my place

by the stairway in the hall or by the stairway that is in the storeroom. If you are in the storeroom you can thus get upstairs without going into the hall. When the agreement mentioned in the plaintiff's testimony was being written and signed in my sitting room I was engaged in conversation with the persons in that room and was also attending to my business in the bar room. After signing the agreement I went into the bar room and then back to the sitting room to get a copy of the agreement and they were all gone to the Villa Flora Club house, opposite my place. I then, within five minutes after the agreement had been signed, took a friend out, Mr. Donaldson, and we measured with a tape line sixty feet from the south east corner of my lot and it came a few inches above the hall door and about even with the wall that runs between the hallway and the storeroom. I did that to see where the sixty feet
22 would go; to see if it would take in the business part of the concern. I found it took the hall door which I always intended to give. I intended to open a store and open some little business. My wife was objecting to waiting in the bar. I had a stock of goods stored in the storeroom at that time. Nat Bryan, a colored man who was working for me was there when I measured the sixty feet.

Thereupon counsel for the defendant asked the witness: "Is the whole of that building necessary for the convenient management of that saloon business"; to which question counsel for the plaintiffs then objected and the court sustained the objection and refused to permit the witness, the defendant, to answer the question; to which ruling of the court the defendant by his attorney then and there excepted and the exception was then by the said Justice duly noted in his minutes.

Thereupon the defendant's attorney asked the witness: "State whether or not about sixty feet of the front from the Southeast corner of that property is sufficient for the convenient management of that saloon business"; to which question counsel for the plaintiffs then and there objected and the court sustained the objection and refused to permit the witness to answer the question; to which ruling of the court the defendant by his attorney then and there duly excepted and the exception was then duly noted by said Justice in his minutes.

(Witness continuing): When the deed was brought to me I looked at it and saw it was not according to the agreement. They brought me a typewritten copy of the agreement but I said I wanted to see the original. I had to get an attorney to compel them to give me a copy. I applied dozens and dozens of times to Andrew Loffler, Mr. Ray and Ernst Loffler for a copy. I refused to sign any papers until I got a copy of the original agreement.

The plaintiffs and the defendant by their attorneys, respectively, then admitted that the defendant on or about May 23, 1905,
23 offered to return to the said Ernst Loffler the \$250. mentioned in the written agreement and that the said Ernst Loffler refused to accept the same.

Certain correspondence between Mr. Ray, attorney for Ernst Loffler and Mr. Bailey, attorney for Hugh Harten, was then given in evidence on behalf of the defendant, consisting of (1st) a letter dated May 23, 1905, from Mr. Bailey to Mr. Ray, as follows:

"DEAR SIR: Enclosed herewith I send you the check of Mr. Hugh Harten drawn on the Second National Bank for \$250. payable to my order as attorney and by me endorsed to the order of Ernst Loffler. This is sent you as attorney for Mr. Loffler for the purpose of returning to him the \$250. mentioned in his contract with Mr. Harten. Upon receipt hereof will you kindly cancel and return to me the contract referred to, which appears to be unsatisfactory to both parties.

Very truly yours,

L. A. BAILEY."

(2d.) A letter dated May 24th, 1905, from Mr. Ray to Mr. Bailey as follows:

"MY DEAR SIR: I acknowledge the receipt of your favor of 23d instant, enclosing check of Hugh Harten for \$250. which check is herewith enclosed. I am instructed to say that Mr. Loffler insists upon the performance by Mr. Harten of his contract, which you erroneously assume, appears to be unsatisfactory to both parties. Mr. Loffler is desirous of taking a conveyance of the property which was agreed to be conveyed to him by Mr. and Mrs. Harten, and I would thank you to inform me by the 26th instant whether Mr. and Mrs. Harten will be prepared to execute the deed which was presented to them several days ago in consummation of that contract.

Yours very truly,

PRESTON B. RAY."

24 (3d.) A letter dated May 25, 1905, from Mr. Bailey to Mr. Ray, as follows:

"DEAR SIR: Your letter of 24th instant is at hand returning to me the check of Hugh Harten for \$250. In answer to your inquiry I have to say that Mr. and Mrs. Harten decline to reconsider their refusal to execute the deed which was presented to them and which you showed to me, and this refusal is based upon the fact that the deed is not in accordance with the contract. The discrepancy between the terms of the deed and the terms of the contract was the basis of my statement that the contract "appeared to be unsatisfactory to both parties" because the failure on the part of Mr. Loffler's attorney, in drawing the deed, to conform to the contract indicated dissatisfaction with the contract on Mr. Loffler's part, and such a construction of the contract on the part of Mr. Loffler is unsatisfactory to Mr. Harten.

Very truly yours,

L. A. BAILEY."

"(Witness HARTEN, continuing:) Andrew Loffler first came to me about two months before the agreement was signed. He said, "I understand you are about to sell you- saloon." I said, "Yes, I think I will." He said, "Will you give it to me at the same price you offered it to Joe Burkart." I said, "I will, but I cannot enter

into any engagement with you until I hear from Mr. Burkart." He did not tell me then what business he was in and I did not know he was in the real estate business, until the second time he came there, then he mentioned the firm's name as Little, Loffler & Jarrel. I asked him on the first occasion whom he was buying it for, or was he buying it for himself. He said it was not for himself but for a friend of his. I said, "Who is your friend." He said "No matter; I will tell you later." I said, "If it is for Ernst Loffler I will not sell to him at any price." He said he would let me know later

25 on. A week or five days after that I got a letter from Mr. Burkart stating that the deal was over so far as he was concerned. That same evening Andrew Loffler came in and I told him of the letter from Mr. Burkart and its contents. He said "You will let me have it for the same?" I said, "I will. Who is your client?" He said, "I will let you know in due time." About a month before the agreement was signed he brought Mrs. Ernst Loffler out there and they sat down in my sitting room and he then told me it was her husband who wanted it and I then withdrew my objections to Ernst Loffler. Mrs. Ernst Loffler was not shown through any of the house then except the sitting room. It was only as a matter of courtesy that I showed Ernst Loffler and his wife the place. He knew every inch of that place years and years ago. He was all around my place previous to that; I suspected he was looking after it and he went in and out and into the yard and all around viewing the place from top to bottom, upstairs and downstairs previous to my ever bringing Mr. Loffler and Mrs. Loffler upstairs. I would not say that Andy Loffler went over it but Ernst Loffler went over it several times. The first conversation between Andrew Loffler and myself about my paying him a commission was after he had got part of the signers for transfer of the license. He then asked me, "Who is going to pay me my commission?" That was after the contract was signed. I said, "Who ever employed you. I haven't got anything to do with it. I am selling my place independent of everything. I have no lawyer and I am selling it on my own responsibility." He said "Cannot you pay part." I said, "So far as commissions are concerned I will pay nothing. You are not entitled to anything. You are buying the place for another party. If I came down and engaged you to sell my place I would be entitled to pay commissions then." He said, "Well, somebody will have to pay me." I said "Whoever employed you will have to pay you." After that he was always talking about commission but I

26 always said I had nothing to do with commissions and would not pay one cent of commissions. I did not hear anything said about commissions at the time Richard was writing the agreement. Andrew Loffler did not then ask me for commission. There was not a word said then about commissions. I had no bartender there that day and while they sat in the sitting room, I was about the bar room and also keeping up the conversation with them in the sitting room. At that time up to the time I signed the agreement, I partly guessed that a sixty foot line from the Southeast corner of my land would take in the hall but whether it

took in the hall or not, the hall was to go with the business part. That was my intention. I never consented to pay anything on the sale.

Upon cross examination the witness Harten further testified as follows: I have been carrying on business out there eight or nine years. I lived there with my family and used the whole place. I could get in by the lane or from the front, to the stable which was at the west end of my tract. And I have been occupying the whole place with my family and carrying on my business there; the ball room was intended for use for giving dances to parties that came out there; but was seldom used; the room underneath it was used for the store room where I stored any stock I did not use in the bar room. Andrew Loffler's testimony about my taking out my check-book and offering to pay him \$100. is not true. Nothing like that occurred. After I had refused to sign the deed, he came out one day and spoke about who was going to pay him his commissions; I said whoever employed you to make this deal; I did not; he did not tell me what he came out to see me about; he asked me "what about these commissions" and I said, whoever employed you should pay you; he always mentioned the matter of commissions every time he came out; who was going to pay him his commissions, and I always replied the same way. I understood him to be buying simply the saloon business and as much of the ground and house as would be necessary for him to carry on that business.

Q. What did you tell him you would give him for that
27 \$12000? A. I did not tell him what I would give. The saloon is all that was mentioned at that time to Mr. Loffler.

Q. When he came out with Ernst Loffler why did you take him over to the store room and to the ball room in the other portion of the house which you say was not covered by your contract and into the kitchen and dining room; what did you show him those for? A. That was the best way up; the other stairway is dark in the other part of the house. They were going in the upper part of the house over the saloon; I took them through the upper part of the house into the ball room; showed them the store room; they could see the stock in it; I told them that it was the storeroom; the reason that I took them over and showed them that part of the building was the stairs going up to the living part of the building is kind of dark; the other stairs were light some; I did not show them the ball room. I don't remember a few moments ago of testifying that I showed them the ball room; I went as far as the pool room.

Q. When you entered into the contract with Loffler to sell him something for twelve thousand dollars, you intended to sell him the house, as I understand it, without a kitchen to it; is that right? A. There was never anything mentioned how much I would sell until I signed the agreement, and I would not sign anything until I seen the agreement; before I signed the agreement, Mr. Loffler went all over the building himself; I went and pointed out places part of the way.

Q. Did you go through the bar room to the sitting room and up

in the ball room and in the store room and over the bar room and in the bed rooms? A. Part of the bed rooms.

Q. Didn't you take them? A. They went by themselves.

28 Q. Didn't you lead them over there; they did not know where the ball room was? A. Yes.

Q. Why did you go with them? A. Just through courtesy. I went over this house and through these rooms the same as anybody who might come in; if they wanted to see the ball room; I would go up with any stranger.

Q. So that the purpose of going through the house was to inspect the house? A. I don't know what their intention was.

Q. What did you go up for? A. To show them along.

Q. For what? A. Through courtesy; they did not ask to go.

Q. Why did you take them in the kitchen and show them the pool room? A. They had to go that way to get into the yard.

Q. Why did you go and show them the yard and show them the stable? A. I did not.

Q. Didn't you go part of the way? A. I went into the kitchen and the pool room, back in the yard, and I says, there is the balance, see for yourselves. I don't know what purpose I had in telling them there is the balance and you can see for yourselves.

Q. Were they not there to see the place? A. They were there to see the saloon.

Q. What did you show them the backyard for if he was buying the saloon? A. There was part of the backyard to go.

Q. How much of the backyard? A. That was never mentioned until the agreement was written up.

Q. Who mentioned it? What was mentioned then? A. It was mentioned that they were to get 60 by 200 feet.

29 Q. Did you tell him that you were not selling but a portion of the place? A. No, the question was never asked me.

Q. Then you proposed to sell him part of a house, is that it? A. I just proposed to sell him whatever the agreement called for; if the agreement called for the whole entire property, I would not have signed the agreement.

(Witness continuing:) I measured simply to know how far 60 feet would go on the front and if it would take anything in but the business part. When they were writing the agreement I did not know they were expecting to get the whole of the property. At the time I signed the agreement I knew that I had 85 feet front, I owned 224 feet on one side and 239½ feet on the other.

Q. When they asked you how many feet front you had you told them about 60? A. Mr. Richard asked that question.

Q. And you told them you had about 60 feet? A. About 60 feet.

Q. And you knew at the time when you were telling them you had about sixty feet that you were lying and you had eighty-five feet? A. I didn't say sixty feet front.

Q. You knew all along that you had eighty-five feet front? A. Yes.

Q. You hadn't said to Mr. Loffler or anybody that you were selling less than the whole of your property, had you? A. I did not.

Q. You know that Mr. Loffler had come out there to buy your property on the 27th of April and to give you a deposit of \$250.?

A. Yes, he gave me \$250.

Q. And you know when they were writing the agreement they were expecting to get the whole of that property? A. I had not.

Q. Had they said they expected to get a part of it? A. No, sir; there was no mention of that.

Q. Why did you tell him you only had sixty? A. Because sixty feet would cover the business part.

30 Q. You told him you had sixty feet, and he put that down, and you signed it that way? A. Yes.

Q. At that time did you tell Mr. Loffler that that only covered a portion of the house? A. No, sir. He did not wait for me to tell him anything. He knew he was getting sixty feet. I never told Mr. Andrew Loffler at any time how far this sixty feet would take; I did not tell Mr. Ernst Loffler when he came out with his wife; I did not think it was necessary to tell him anything about it. The contract called for what they were to get. I knew at that time that this ball room and the store room and all that portion of the house on the north side of the hallway were not covered by this contract; I did not tell any of them of that. I took Mrs. Loffler up through the ball room by the stairway in the new part of the building because the other stairway in the old part was dark. The understanding from the first to the last was that there was no stock to be included in this sale. I told Mr. Loffler that a few days previous to my signing the contract; the time that I went and showed him over the house.

Q. Why didn't you tell him that portion of the house didn't go at the same time? A. I did not.

Q. Why didn't you? A. I had no occasion to tell him. I was selling the saloon. That was my intention all the way through. This was not a portion of the saloon. I used the store room for the purpose of keeping stock, and I used the ball room as a portion
31 of my business whenever there was occasion to use it. The first time Andrew Loffler spoke to me about commissions was when he was getting the signers. He had part of them then. I can't put a date on it. I can't state exactly whether he had mentioned it before or after the agreement was signed, I think it was after the agreement was signed, a couple of days, may be 3 days. It was when he came out to get the signers. The only reason I had for not signing the application for the liquor license was because they would not give me a copy of the original agreement; that is the reason I would not sign the deed when they offered to pay me. At that time I had my arm in a sling; I had sprained my wrist. Never a word about offering \$100 to call the matter off was mentioned.

Redirect:

I do not think the question Mr. Richard asked was the same as Mr. Tobriner stated a few moments ago. I think Mr. Richard himself said sixty feet. He knew there was eighty-five feet front.

(By a JUROR:)

Q. When you told Mr. Loffler that you had sixty feet, did you tell him from which corner it was reckoned, from the north or the south corner of the property? A. I did not.

(By a JUROR:)

Q. Was that question ever raised? A. That question was never asked but I understood it was the saloon.

Thereupon, JULIA HARTEN, a witness produced and sworn on behalf of the defendant, testified as follows: I am the wife of the defendant. About two weeks before my husband and I signed the agreement to sell to Ernst Loffler, I had a conversation with Andrew Loffler at our place. I asked him if he was buying the place of business for himself. He said no, not exactly for himself but for a friend and that he and his friend were going in as partners.

32 Thereupon the defendant's attorney asked the witness: "Did Mr. Harten know about that." To which the witness answered, "Yes, I told my husband after Mr. Loffler went away." Thereupon the court, upon the objection of counsel for the plaintiffs to said question and answer, instructed the jury to disregard the same; to which instruction the defendant by his attorney then and there duly excepted and the exception was then duly noted by said Justice in his minutes.

Thereupon the defendant by his attorney put in evidence the deed mentioned in the testimony and which the defendant, as stated in the foregoing testimony, was requested to sign and refused to sign, for the conveyance by Hugh Harten and Julia Harten, his wife, to Ernst Loffler for the sum of \$12000 in fee simple the entire tract of the defendant's land hereinbefore described and also the good will fixtures and license of the bar room business there conducted by the defendant.

Thereupon the defendant rested.

Thereupon in rebuttal, the plaintiffs adduced evidence tending to prove that the defendant did not ask to see the original contract or for a copy as testified by the defendant. And by Mrs. Anna Loffler that she had never been out at the defendant's place but once and that was with her husband, Ernst Loffler a couple of days after the contract was signed.

And thereupon the plaintiffs rested and the defendant had no more testimony to offer and the foregoing was all the evidence adduced at the trial.

And thereupon the defendant moved the Court to instruct the jury to return a verdict for the defendant upon the grounds that it appears upon all the evidence that the plaintiff Andrew D. Loffler was employed in the transaction by Ernst Loffler and not by the defendant and is claiming commission upon a sale that was never made; but the court overruled the motion; to which ruling of the court the defendant by his attorney then and there excepted
33 and the exception was then duly noted by said Justice in his minutes.

And thereupon the court charged the jury as follows:

"Gentlemen of the jury, the plaintiff brings this suit to recover the sum of \$300. which he claims he is entitled to from the defendant, as an agreed commission for the sale of the property and the business connected with the property described in the declaration and the proof in this case, and which you will have with you upon your retirement to the jury room.

The question here is a question of fact and so there is little I can say to you in regard to the law.

In the first place the burden of proof here is upon the plaintiff. That is, before the plaintiff is entitled to your verdict you must be satisfied by a fair preponderance of the evidence that the plaintiff was employed by the defendant to sell the property described in the declaration, and that he sold the same pursuant to such employment, or in other words, that the sale was effected by the plaintiff as the duly authorized agent of the defendant, Harten, for the particular purpose of selling this property.

Another question that you must determine is, if he was employed for the purpose of selling the property described in the declaration, did he sell it under a contract whereby he was to have a commission of \$300. First, was he employed to sell this property and, secondly, what commission, if any, was he to receive from the defendant? Those are the two general propositions; and the burden of proof is upon the plaintiff as to both of these propositions.

Testimony has been offered for the purpose, not of contradicting this written contract of April 27, but for the purpose of enabling you to ascertain to what that contract relates, that is, whether it relates to the whole of the property or only to a part of it. Parol or verbal testimony cannot be admitted for the purpose of altering

34 or varying the terms of a written contract. Therefore the testimony has not been allowed to go to you for that purpose, but simply to enable you to ascertain what the contract applied to, whether the "about 60 feet" was intended between the parties to take in the whole of the property or simply about 60 feet front.

Now, the first question is, was the plaintiff here employed by the defendant to sell this property? If you should find against the plaintiff on that proposition, that will end the inquiry. If you should find he was employed, the next question is, what was it he was to sell? Was he to sell the whole of that property or only a part of it? If he was to sell the whole of it, then what was his compensation to be?

There is testimony tending to show that at the time the contract of April 27th was signed, the plaintiff and Ernst Loffler, the purchaser of the property, visited him, and that they in company with the defendant looked over the house and over the property. There is testimony tending to show that after the contract was made, the wife of the purchaser of this property saw the property and was shown through. Now, these are questions that you must take into consideration for the purpose of ascertaining to what that contract related.

The defendant says that he did not tell the plaintiff that he only

intended to sell 60 feet front; that he spoke of selling his saloon, and that he intended that this "about 60 feet" should only cover that exact number of feet from the southeast corner.

Now, it is for you to determine whether he meant to sell his property situated as it is here and was negotiating concerning it in the manner indicated by this testimony. He could not reasonably expect that the man who was purchasing it understood, as he claims he understood himself, that not the whole of it, but only a portion of it was to go under the contract of sale. He says the measurement was to end 60 feet from the southeast corner. If that is where it should end, then you have a right to inquire whether the north line of that strip of ground running at right angles with the front and
35 *running back for 200 feet, would or would not extend beyond his own land, or if it was to run so as to make a right-angle triangle, as the whole of it is. And then, what effect that would have upon the house, if that line were carried diagonally through the building.*

You must consider all those matters and determine whether or not it is reasonable that he understood and that it was understood between the parties that only a portion of the building was to be included in the sale, and only a portion of the land.

Bear in mind that you cannot make a new contract for these people. The plaintiff's claim is simply based upon an oral agreement between himself and the defendant, as he alleges. You cannot compromise this matter between them or make a new contract. You have to deal with the situation exactly as it is. Therefore, it is your duty in this case to carefully consider all the circumstances connected with this entire transaction, as well as the testimony of these several witnesses, with the view to determining whether the testimony of the plaintiff here or the testimony of the defendant is the more reasonable and more rational under the circumstances.

Now, it is your duty to reconcile this testimony if you can, there being a sharp conflict between certain of these witnesses. It is your duty to reconcile the testimony upon the theory that all these witnesses intend to tell the truth. But if you are not able to do that, and you are satisfied that any witness in this case has falsely and knowingly sworn to a material fact about which he could not have been mistaken, you have a perfect right to reject the testimony of any such witness. But if you can reconcile their testimony on the theory that all these witnesses intended to tell the truth it is your duty to do so in the first instance.

You should also take into consideration the physical condition of the property, whether or not it be reasonable that the parties would have contracted and did contract with reference to the whole
36 *of the property or only a part; and you should take into consideration the testimony of the witnesses and all the circumstances in the case attending these transactions and the physical condition of the property itself in determining that question.*

Now, if you are satisfied that the plaintiff was employed by the defendant to sell the whole of this property, and he did sell the

whole of it, then it is your duty to return a verdict here with interest for the full amount of \$300.

The question is, was he employed by the defendant for the purpose of selling the whole of this property? Did he sell the whole of it, and in the third place what was his commission to be?

I think that, gentlemen, is about all I need say to you. As I said at the outstart the issue is one of fact about which neither the arguments nor the instructions of the Court can aid you but little. You will not be influenced by any bias or prejudice which you may have against any of the parties to this suit or any body connected with it, and it is your duty to consider your verdict strictly from the testimony of the witnesses coming before you under the instructions of the Court."

And thereupon and before the jury retired to consider of their verdict, the defendant by his attorney then and there duly objected and noted an exception to so much and to every part of said charge to the jury as permits the jury to consider the parol evidence tending to prove that the defendant sold or intended to sell or that Ernst Loffler intended or expected to buy or that the plaintiffs as agents of the defendant effected a sale of the whole of the defendant's said tract of land or any part thereof in excess of the quantity stated in the written agreement, and particularly to those portions of the charge in italics or underscored; upon the ground that every such portion of the charge is contrary to law and is without competent

37 evidence in support thereof, and that the written contract of sale, if sufficiently definite and certain to be enforced at all, is conclusive in this suit as to the quantity of land sold or intended to be sold by the defendant.

And thereupon the jury retired to consider of their verdict and thereafter returned a verdict in favor of the plaintiffs, for \$300.00.

And the defendant by his attorney thereafter duly submitted this his bill of exceptions and prayed the court to settle and sign the same which is accordingly done, now for then, this 24th day of July, A. D. 1907.

THOS. H. ANDERSON, *Justice*. [SEAL.]

This 24th day of July, 1907, the parties stipulate that the two (2) photographs and the map or plat used in evidence in the trial of this cause in the Circuit Court may be referred to and considered part of the record on appeal instead of being copied in the record.

LEON TOBRINER, *For Plff.*

LORENZO A. BAILEY, *For Def't.*

Order to Prepare Transcript on Appeal.

Filed July 24, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47992.

ANDREW D. LOFFLER ET AL.

v.

HUGH HARTEN.

The Clerk will please prepare the transcript of record on appeal, including the following:

(1) Memorandum showing that on Oct. 4, 1905, the def't Harten filed his petition for the writ of certiorari to remove the writ from R. H. Terrell, Justice of the Peace, to this court for trial and the writ duly allowed and issued and returned served; that on Oct. 5, 1905, the return of the writ was filed.

(2) Copy of Declaration, Pleas and Joinder in issue, omitting affidavits.

(3) Entries showing the following:

Verdict, May 9, 1906;

Judgment and appeal noted in open Court June 11, 1906;

Appeal bond filed, supersedeas, June 12, 1906;

(4) Memorandum showing the substance and effect of the orders made May 29 and Oct. 1, 1906, and Jan'y 7, June 11, 1907, extending time, etc., and submission of Bill of Exceptions Oct. 1, 1906, and settlement and filing of Bill of Exceptions, July 24, 1907.

(5) Copy of Bill of Exceptions.

LORENZO A. BAILEY,

Att'y for Def't.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47992, wherein Andrew D. Loffler, *et al.* are Plaintiffs, and Hugh Harten is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 10th day of August, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,

By ALF. G. BUHRMAN,

Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1819. Hugh Harten, appellant, *vs.* Andrew D. Loffler *et al.* Court of Appeals, District of Columbia. Filed Aug. 10, 1907. Henry W. Hodges, clerk.

